FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 599.

BILL WILLIAM PROHOROFF,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No.

BILL WILLIAM PROHOROFF,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Northern Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF COURT BELOW.

The opinion of the United States Court of Appeals is already reported (*Prohoroff* v. *United States*, 9th Cir., 259 F.2d 694). It is in the Record, pages 53-56. It is also Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION.

The judgment of the Court of Appeals was entered on October 9, 1958 [R. 57; also see Appendix B to this petition].

The final judgment of the Court of Appeals (denial of the seasonably filed Petition for Rehearing) was entered on November 21, 1958 [R. 58; also see Appendix C to this petition]. The petition for writ of certiorari is filed within the required 30 days' time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The district court has jurisdiction under 18 U.S.C., §3231.

3. QUESTIONS PRESENTED AND HOW RAISED.

I.

The threshold question of availability of defenses is present because appellant never took an administrative appeal.

The question here presented is whether the rule of exhaustion of administrative remedies should be relaxed due to the presence of mitigating facts. This question was raised when the trial judge stated that he had "no power"

to review the propriety of the action of the local board because of the defendant's failure to appeal during the administrative process (R. 36).

II.

Appellant presented written evidence to the local board which, if true, showed that he met all the statutory requirements for a conscientious objector classification. Without any recorded adverse evidence the board rejected his *prima facie* case.

The question here presented is whether his file shows anything that constituted a basis in fact for rejecting his evidence. This question was raised by the motion (R. 4). and by the trial court's refusal to consider this ground (R. 36).

III.

Appellant presented evidence that there were four selective service local boards officed together in Fresno (R. 12, 23). Appellee offered evidence to show that Local Board No. 71 had geographical jurisdiction over the area where appellant resided on the date of his registration.

The question presented here is whether appellee's evidence was admissible over objection (R. 25, 26, 32, 33), and did it afford a basis for the trial court to take judicial knowledge that this local board had geographical jurisdiction.

4. STATUTES AND REGULATIONS INVOLVED.

Section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. (Supp. V), §451(c), is involved. Also, Section 10 (b)(3) of the act must be con-

sidered (50 U.S.C. App. (Supp. V), §456(j), 65 Stat. 75, 83, 86) and §12(a).

Sections 1624.1, 1622.11, 1622.14, 1604.51 and 1604.54 of the regulations (32 C.F.R.) are involved.

They are printed as Appendix D below.

5. STATEMENT OF THE CASE.

The indictment charged appellant with violation of the Universal Military Training and Service Act (R. 3-4). It was alleged that he became a registrant of Local Board No. 71 of the Selective Service System in the County of Fresno, State of California, and that having theretofore been duly classified in Class I-A, did knowingly refuse and fail to comply with the order of his said Local Board No. 71 to report for induction (R. 3-4).

Appellant pleaded not guilty, waived jury trial and was tried on December 30, 1957 (R. 9). A written motion for judgment of acquittal was filed (R. 4-5). The motion was denied and the appellant was found guilty and sentenced on January 20, 1958 (R. 39). The motion contains all of the grounds that the Appellant relies upon for reversal of the judgment in this case (R. 50).

6. THE FACTS.

Appellant was registered with the Selective Service System on December 30, 1952 (Ex. 1, 2); this registration and all subsequent acts were the result of repeated effort by the F.B.I. (Ex. 115, R. 43).[1]

---

[1]All references to the Transcript of Record are designated by pages of it, as follows: [R. 3]. A photocopy of

He was sent the standard Classification Questionnaire (SSS Form No. 100) on February 2, 1953. He returned this 8 page form with only his signature inserted (Ex. 7-14) accompanying it with a letter stating "When I talked to your detectives in Fresno I explained our whole religion to them." (Ex. 16). At the time of his sentencing he informed the Court that he considered it wrong to perform any part of the conscription process but that, at the urging and on the advice of the F.B.I. agent, he cooperated as a law-abiding citizen (R. 43).

So, with the F.B.I. agent bringing him in again and again for questioning and explaining, at every step, he not only registered but signed and returned the Classification Questionnaire and eventually the Special Form for Conscientious Objectors (SSS Form No. 150) (R. 46, Exs. 64-67).

In this Special Form he claimed that he should be exempted from *military* service of any kind because he had opposition to participation in warfare on religious grounds (Ex. 64). He showed that he believed in a Supreme Being; that he had had religious training (Ex. 64); that he was raised in the Molokan faith and believed in it (Ex. 65, No. 3); that he was a complete pacifist (Ex. 65, No. 5) and that he had given public expression of his beliefs (Ex. 65, No. 7). He showed that both his parents were Molokans (Ex.

---

the entire Selective Service File of Appellant was entered in evidence as Government's Exhibit 1. The file is not part of the Transcript of Record but is before the court. All references to the file are designated as pages of Exhibit 1, as follows: [Ex. 3]; the pagination of Exhibit 1 is by a one-quarter inch high pencilled number, circled, and ordinarily is found at the bottom of each sheet of the Exhibit.

66, No. 5) and that his church was one of the so-called historic peace churches (Ex. 66, No. 2 (e)); that he never had been connected with any military organization (Ex. 66, No. 3) and he gave three references pertaining to his sincerity (Ex. 67).

Thereupon the Local Board without any evidence contradicting any of his showings reclassified him in the same Class I-A (available for any type of military service) (Ex. 15).

Thereafter he was ordered to report for induction, and, upon his failure to do so was indicted.

7. REASONS FOR GRANTING THE WRIT.

I.

An important question presented by the petitioner has not been determined by the Court, but should be.

It is whether the rule of exhaustion of administrative remedies may be relaxed and, if not, are all defenses to be therefore barred?

Just as the holding of this Court in *Falbo* v. *United States*, 320 U.S. 549, was originally taken by *all* courts to mean that no defenses were permissible in Selective Service cases (see note to Mr. Justice Frankfurter's concurring opinion in *Estep* v. *United States*, 327 U.S. 114), so is Falbo still taken by some courts to bar all defenses when failure to exhaust administrative remedies appears to be present.

Surely it was not the intent of this Court (nor of Congress) to place one who is defending in a criminal case as a result of an administrative agency processing in a worse position than other defendants in criminal cases. He should have available, at the least, the defenses ordi-

narily available to all defendants. Furthermore, defendants such as petitioner should have the opportunity to use all defenses and not have a bar set up to some normal defenses by reason of the court-made rule of exhaustion. Such defendants never may have benefit of counsel at the administrative hearing (see 32 C.F.R., Section 1624.1, in Appendix D).

The Ninth Circuit has uniformly denied such defendants their defenses. See footnote 2 on page 511 of *Evans* v. *United States*, February 24, 1958, 252 F.2d 509. The Third Circuit split four to three on this subject in *United States* v. *Palmer*, June 20, 1955, 223 F.2d 892. The Eighth Circuit, on the other hand, has rejected the petition of the government for a rehearing in *Batterton* v. *United States*, No. 15977, November 28, 1958, F.2d . There, the reversal was on "no-basis-in-fact", a defense explicitly barred in the instant Prohoroff case.

In *Batterton, supra*, the government's petition argued:

> "*The Registrant Was Not Entitled to a Judicial Review of His Classification Since He Failed to Report for Induction.*
>
> "Although this point was not briefed in the appeal nor considered by the Court in its opinion, it is a proposition of fact and law which is controlling upon the Court. The defendant was charged with (R. 1) and convicted of 'failing to report for induction'.
>
> "Having failed to report for induction he has failed to comply with all the administrative steps necessary to determine whether he was acceptable for military service and therefore is not entitled to a judicial review of his classification to determine if his classification had a basis in fact."
>
> *Falbo* v. *U. S.*, 320 U.S. 549.
>
> *Van Bibber* v. *U. S.*, (8 Cir.) 151 F.2d 444.
>
> *Bronemann* v. *U. S.*, (8 Cir.) 138 F.2d 833.

"Since the reversal of the trial court was on the sole basis of there being no basis in fact for the classification, the Court should grant this motion for a rehearing."

It is to be noted that all cases cited by the government in the above Batterton petition are pre-Estep (*supra*).

It is thus evident a conflict of opinion exists and it is desirable that the lower courts have a clear and uniform rule to follow.

Prof. Kenneth C. Davis, in the Preface to his forthcoming four volume Administrative Law Treatise emphasizes the need for clarification on the problem of judicial relief when administrative remedy has not been exhausted, and points out that this Court's various opinions on the subject should be integrated.

At this writing the time has not yet expired in the *Batterton* case, *supra*, for the government to file a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. Since the question is common to both it is suggested that consideration of the instant petition be delayed until consideration be given the petition in the Batterton case, or the expiration of time for filing one.

The defenses claimed by the petitioner in the trial court and argued on appeal to the Ninth Circuit were two: that there was no basis in fact and that there was insufficient proof of geographical jurisdiction.

II.

The no basis in fact defense was brushed aside by the Ninth Circuit with a brief recitation of petitioner's uncooperative conduct with the Selective Service System. Petitioner had argued this was corroborative evidence of

his staunch, sincere belief Molokan pacifists were not to be drafted.

The undisputed documentary evidence in the Selective Service file (government's exhibit) is that no question was raised by the administrative agency concerning petitioner's veracity or sincerity. We thus have a *prima facie* situation similar to *Dickinson* v. *United States*, 74 S. Ct. 152, 158, and to *Batterton, supra*, where the Eighth Circuit followed the Dickinson rule, and, as shown above, ignored the failure to exhaust bar.

III.

The insufficient proof of geographical jurisdiction defense: Petitioner was explicitly barred from use of this defense by the Ninth Circuit (R. 54).

Nevertheless, the Ninth Circuit considered this defense on its merits and rejected it. This consideration, however, overlooked the existence of *Johnston* v. *Jones et al.*, 66 U.S. 209, 225 (that maps are not independent evidence) and for this additional reason this Court should favorably consider this petition.

CONCLUSION.

This petition should be granted for the law on the issues presented should be clarified and made uniform.

Respectfully submitted,

J. B. TIETZ,
Counsel for Petitioner.

December 19, 1958.

APPENDIX

APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BILL WILLIAM PROHOROFF, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

No. 15,911
Oct. 9, 1958

Appeal from the United States District Court for the Southern District of California, Northern Division.

Before: FEE and HAMLIN, Circuit Judges, and BOWEN, District Judge.

BOWEN, District Judge:

This is an appeal by appellant Prohoroff, a Selective Training and Service Act (50 U.S.C.A.App. §451 et seq.) registrant, from the judgment and 6-months jail sentence imposed against him by the District Court sitting without a jury in a trial for appellant's wilful failure to report for induction into the Armed Forces as required by Local Draft Board 71, Fresno County, California, pursuant to grand jury indictment under §462 of that Act.

As justification for such failure to so report, appellant claims to be a conscientious objector.

Appellant objects to Draft Board 71's jurisdiction over him which he contends was not established because certain exhibits relied upon by appellee to prove appellant's

address was within the exterior boundaries of that Board were not sufficiently authenticated for admission in evidence. But we find the record amply justifies the District Court's findings and ruling that "We do have the fact that * * * Mrs. Ford has been employed as co-ordinator of the four Boards since 1948 [the year they were organized], and these documents without question are documents within the office of the Board. They have been certainly acted upon as being genuine documents and an examination of the documents reveals that at the time this defendant [appellant] registered he was within the jurisdiction of Local Board 71." Those properly made findings sufficiently validate the District Court's admission in evidence of the questioned exhibits, called by the Court "documents". McCormick, Evid. (1954), §191, p. 403; U. S. vs. Ward, 173 F.2d 628 (2 Cir., 1949); Morgan vs. U. S., 149 F.2d 185 (5 Cir., 1945). For statement of general rule, see Olender vs. U. S., 210 F.2d 795, at 801, syl. (7) (9 Cir., 1954).

That validation and those findings and much of their supporting evidence are applicable specifically to the questioned document exhibit which came to the Board office from State Headquarters purporting to be the official record of the area description of Board 71 with "Local Board No. 71" typed at the top of that exhibit which contained also the typewritten legal description of the Board 71 area. And such validation, findings and supporting evidence are likewise specifically applicable to the questioned map exhibits which are maps of the same area as that shown in that legal description in the document exhibit and were made up by officials in the course of their service under the Act for use and were used by those working in the Board office.

Even if those questioned exhibits were not sufficiently authenticated for admission in evidence, although we hold

they all were, appellant would nevertheless be deemed barred from now objecting to the geographical jurisdiction of Board 71 over him because of his failure as to that objection to exhaust his administrative appeal remedies, hereinafter more fully dealt with upon another question. Evans vs. U. S., 252 F.2d 509 (9 Cir., 1958); McLenigan vs. Grymes, 59 F.Supp. 846 (D.C.M.D.Pa., 1945). See also Mason vs. U. S., 218 F.2d 375 (9 Cir., 1955).

We overrule appellant's objection to the District Court's admission in evidence of those questioned exhibits.

Respecting his claimed conscientious objector status, appellant contends that the Draft Board unlawfully classified him 1-A as one liable for combat duty when, as he asserts, he was entitled to be classified as a conscientious objector and exempted from such combat service, and that for that reason the District Court erred in denying his motion for acquittal and in failing to find him not guilty.

The record, however, shows conclusively that three different times the Local Board 71 on the facts before it classified him as one required to perform combat training and service and each time notified him to report for induction for such service, but each time he failed and knowingly refused to do so; that, although in an unsworn statement made on the day of his sentencing about 20 days after the actual trial when the case after submission had been decided against him he informed the District Court that the investigating F.B.I. agent who he said was very co-operative did not advise him about making an administrative appeal from the Board's adverse decision, yet in the same unsworn statement he admitted that such appeal information was stated on the Board's card notices to him, and that the F.B.I. agent told him he should fill out the conscientious objector form and why he should do that;

that the appellant knowingly did not seek his remedy of administrative appeal from any one of those three classifications and induction notices; that appellant caused several delays in the Board's contacting him by his wilfully giving a wrong address at which he might be reached or by his failure to notify the Draft Board of change in his address; and that before he was indicted he intentionally declined to heed his father's advice that he consult his father's attorney regarding the Board's classification of him and notices to him to report for induction.

The recent decision of this Court in Evans vs. U. S., supra, after exhaustively reviewing decisions of this and other courts, held that a registrant failing to exhaust his remedies of administrative appeals under circumstances similar to those just stated in appellant's conduct has no standing to seek from the Court the same relief he might have obtained by such administrative appeals. A lengthy review here of such cases would serve no useful purpose. The Evans case rule on that point is clearly applicable and we apply that rule in this case. We reject appellant's contention of error in the District Court respecting his classification and induction notices, since he knowingly failed to exhaust his remedies of administrative appeal.

Other specifications of error are urged by appellant, but we find them without merit and deny appellant's contentions as to them.

The judgment and sentence of the District Court in this case in all respects are AFFIRMED.

(Endorsed:) Opinion. Filed Oct. 9, 1958.
Paul P. O'Brien, Clerk.

APPENDIX B.

[TITLE OF COURT AND CAUSE.]

Judgment.

Appeal from the United States District Court for the Southern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: October 9, 1958
PAUL P. O'BRIEN, Clerk.

APPENDIX C.

[TITLE OF COURT AND CAUSE.]

Excerpt from Proceedings of Friday, November 21, 1958

Before: FEE and HAMLIN, Circuit Judges, and BOWEN, District Judge

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant, filed November 6, 1958, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

APPENDIX D.

Statutes and Regulations Involved.

Section 6(j) of the act (50 U.S.C. App., § 456(j); 65 Stat. 75, 83, 86) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief, in this connection, means an individual's belief in a relation to a Supreme Being, involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

Section 1622.14 of the Selective Service Regulations (32 C.F.R., § 1622.14) provides:

> "Class I-O: *Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.*
>
> —(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

Section 1622.11 provides:

> "Class I-A-O: *Conscientious Objector Available for Noncombatant Military Service Only.*—(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious

training and belief, to be conscientiously opposed to combatant training and service in the armed forces."

1624.1 *Opportunity to Appear in Person.*—(a) Every registrant, after his classification is determined by the local board except (1) a classification which is determined upon an appearance before the local board under the provisions of this part or (2) a classification in Class I-C, Class I-W, Class IV-F, or Class V-A, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended.

(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided*, That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further*, That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

The Selective Service regulations (32 C.F.R.) provide that the county shall be divided into local board areas:

LOCAL BOARDS.

1604.51 Areas.—The State Director of Selective Service for each State shall divide his State into local board areas. Normally, no such area should have a population exceeding 100,000. There shall be at least one separate local board area in each county: provided, that an intercounty local board may be established for an area not exceeding five counties within a State when the Director of Selective Service determines, after considering the public interest involved and the

recommendation of the Governor, that the establishment of such local board area will result in a more efficient and economical operation.

1604.54 Jurisdiction.—The jurisdiction of each local board shall extend to all persons registered in or subject to registration in, the area for which it was appointed. It shall have full authority to do and perform all acts within its jurisdiction authorized by the selective service law.

It is submitted that the Act itself (U.S.C., Title 50, App. Sec. 10 (b) (3)) completely clarifies the point petitioner is relying on:

"Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the *respective* jurisdictions of such local boards to hear and determine * * *." (Italics supplied)